No. 74-1229

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MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, ET AL., *Petitioners*,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

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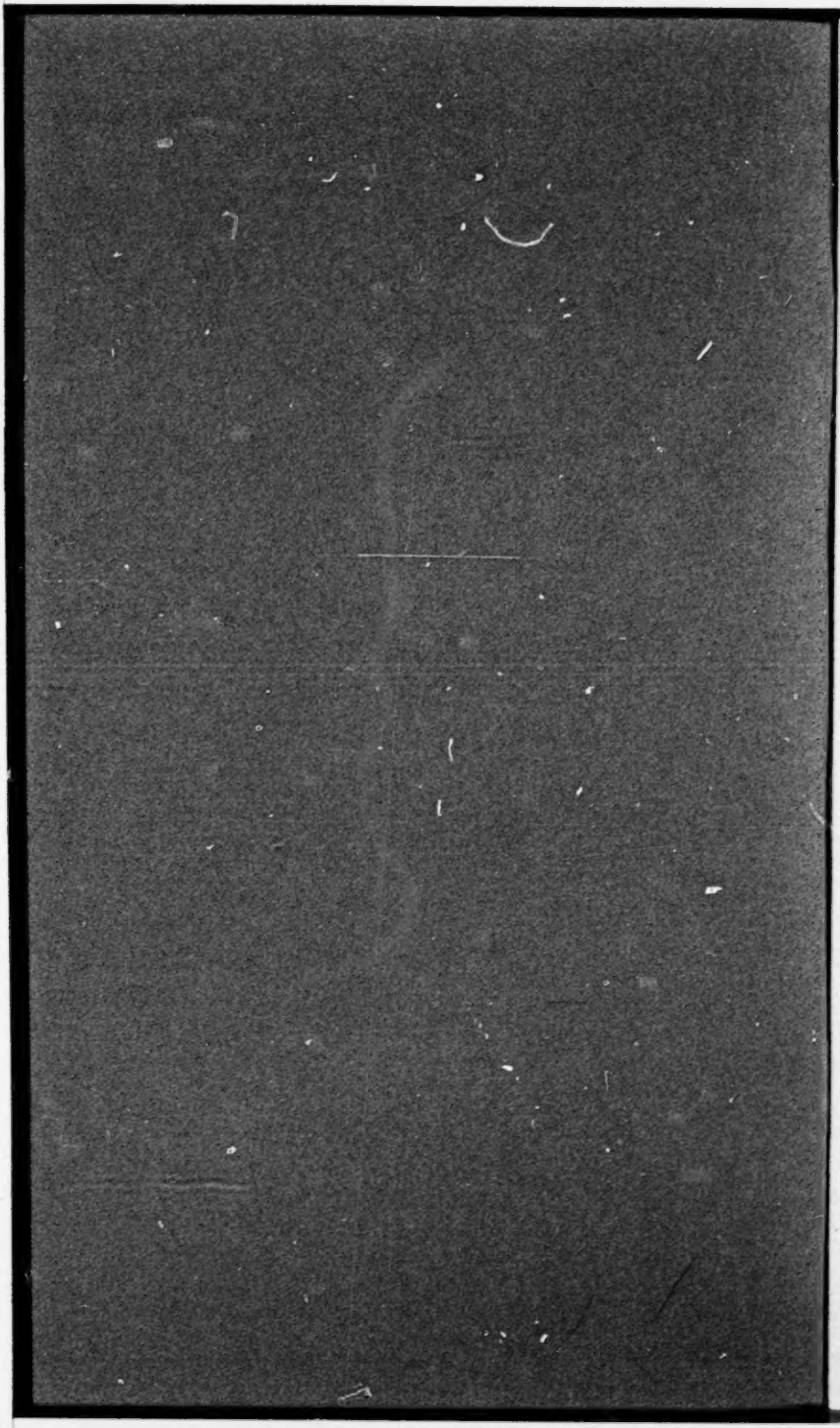

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BRIEF OF THE RESPONDENT SOUTHERN PACIFIC COMMUNICATIONS COMPANY IN OPPOSITION

The Southern Pacific Communications Company ("Southern Pacific"), a party intervenor to the proceedings in the United States Court of Appeals for the Third Circuit whose judgment is sought to be reviewed, respectfully submits this brief in opposition to the peti-

tion of American Telephone and Telegraph Company ("AT&T") et al. ("the Bell System") for a writ of certiorari in the above-entitled proceeding.

OPINIONS BELOW

The decision of the Federal Communications Commission ("the Commission") is reported at 46 F.C.C.2d 413 (1974), and appears as petitioners' Appendix B (Pet. App. B). The opinion of the United States Court of Appeals for the Third Circuit is reported at 503 F.2d 1250 (1974), and appears as petitioners' Appendix A (Pet. App. A).

JURISDICTION

The judgment of the Court of Appeals (Pet. App. C) was entered on September 11, 1974, and an order denying a petition for rehearing (Pet. App. D) was entered on October 30, 1974. The petition for a writ of certiorari was filed on March 28, 1975. The time for all non-Federal respondents to file a response to the petition was extended by the Clerk to and including May 16, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

In addition to provisions of statutes set forth in the Appendix (Pet. App. E), this case also involves Sections 4(i) and 4(j) of the Communication Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), which provide in pertinent part:

> (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

> (j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. * * *

and Section 4 of the Administrative Procedure Act, as recodified, 5 U.S.C. § 553, which provides in pertinent part:

> (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> * * * * *
>
> (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. * * *

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Commission afforded petitioners the "opportunity for hearing" under Section 201(a) of the Communications Act of 1934, as amended,[1] in

[1] 47 U.S.C. § 201(a).

ordering the Bell System to furnish interconnection facilities to specialized carriers essential to the rendition of their authorized communications services, and gave adequate notice of the nature of the interconnection required, where

(a) in an evidentiary adjudicatory hearing, the Commission found that insufficient evidence had been offered by the Bell System "to support a conclusion that the proposed interconnection is not feasible";[2]

(b) in a rule making proceeding, the Commission declared it unnecessary to elaborate on interconnection requirements because the Bell System had represented it was prepared to work cooperatively to furnish any connections that might be required;[3]

(c) in an exchange of correspondence, the Commission Chairman, at the direction of the Commission, advised the Bell System that it was required to file tariffs to provide interconnection facilities "essential to the rendition by the specialized carriers of all their authorized services";[4] and

(d) in a show cause proceeding, the Commission found, on the basis of pleadings, briefs, reply

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[2] *Microwave Communications, Inc.*, 18 F.C.C.2d 953, 965 (1969), reconsideration denied, 21 F.C.C.2d 190 (1970), modifications granted, 27 F.C.C.2d 380 (1971).

[3] *Specialized Common Carrier Inquiry*, 24 F.C.C.2d 318 (1970), 29 F.C.C.2d 870, 940 (1971), reconsideration denied, 31 F.C.C.2d 1106 (1971), affirmed sub nom. *Washington Utilities & Transportation Commission* v. *FCC*, No. 71-2919 (9th Cir. Jan. 20, 1975).

[4] See *Bell Tel. Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250, 1257 (1974) (Pet.App. A, 13a).

briefs, and oral argument, that the Bell System had failed to come forward with specific factual allegations and engineering or other supporting statements to demonstrate that there are significant unresolved factual questions which require a hearing, and that the issuance of the broad interconnection orders was required in order to serve the public interest by competition among communications common carriers on a fair and non-discriminatory basis.[5]

2. Whether petitioners could lawfully unilaterally abrogate binding contracts with The Western Union Telegraph Company by filing tariffs with the Commission.

STATEMENT OF THE CASE

In 1969, after an evidentiary hearing commenced six years earlier, the Commission authorized a new common carrier to provide specialized communications carrier private line service between St. Louis and Chicago in competition with the Bell System.[6] The Commission made clear that it expected the existing carriers, including petitioners, to provide local loop interconnection to the new specialized carrier, absent a significant showing it is not technically feasible.[7] After several other new carriers also filed applications to provide specialized communications service, the Com-

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[5] *Bell System Tariff Offerings*, 44 F.C.C.2d 245 (1973), 46 F.C.C. 2d 413, 426-428 (1974) (Pet.App. 25b-27b), affirmed sub nom. *Bell Tel. Co. of Pennsylvania* v. *FCC*, 503 F.2d 1250 (1974) (Pet. App. A).

[6] Note 2 *supra*.

[7] Id., 18 F.C.C.2d at 965, 21 F.C.C.2d at 193.

mission instituted a rule making proceeding to determine whether the public interest would be served by permitting new carriers to compete in the field of specialized communications service.[8] In its notice of inquiry, the Commission emphasized that it expected an established carrier to provide interconnection where it has monopoly control over essential facilities, and requested comments on the methods of providing local distribution.[9] At the conclusion of the proceeding, the Commission reaffirmed its view that "established carriers with exchange facilities should, upon request, permit interconnection or leased channel arrangements on reasonable terms and conditions", but found it unnecessary to elaborate upon their obligations because of its reliance upon the representations of cooperation from petitioners and other telephone companies.[10]

Following complaints that the Bell System companies were not providing prompt and effective interconnection to specialized carriers, and an exchange of correspondence, the Commission Chairman by direction of the Commission advised the Bell System to file tariff schedules which "will provide the interconnection facilities essential to the rendition by the specialized carriers of all their authorized services on terms and conditions which are just, reasonable, and non-discriminatory."[11]

After further disputes among the new and established carriers, the Commission issued an order to show cause to the Bell System, received briefs and reply briefs,

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[8] Note 3 *supra*.

[9] Id., 24 F.C.C.2d at 347.

[10] Id., 29 F.C.C.2d at 940.

[11] See Note 4 *supra*, 503 F.2d at 1257 (Pet.App. 13a).

and heard oral argument from numerous parties, including argument in the nature of testimony from the President of AT&T's Long Lines Department alleging harm to the network and the public, before issuing the decision which is the subject of the petition for a writ of certiorari before this Court. Included in the Commission's inquiry were questions whether the Commission had previously ordered the Bell System to provide physcial connection of specialized carrier facilities to two particular elements of private line service known as Foreign Exchange service (FX) and Common Control Switching Arrangements (CCSA), and if not whether it should be ordered to do so.[12] The Commission, after reciting the course of events and the various considerations which led to its conclusions, held that its prior orders covered interconnection for the broad range of services which specialized carriers are authorized to provide, including FX and CCSA, and that in any event the Commission had again reviewed the question of interconnection, given careful consideration to the briefs and oral argument of the Bell System, and again concluded that the public interest requires that Bell provide interconnection facilities for all of the authorized facilities of the specialized carriers, including FX and CCSA.[13]

The Commission also held that the Bell System cannot supersede, modify, or terminate the contracts for the exchange of facilities with The Western Union Telegraph Company (Western Union) terminable in their terms only upon the giving of five years' written

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[12] Note 5 *supra*, 44 F.C.C.2d at 251-252.

[13] Id., 46 F.C.C.2d at 417-427 (Pet.App. 9b-26b).

notice, merely by filing tariffs or taking other unilateral action.[14]

The United States Court of Appeals for the Third Circuit affirmed these rulings of the Commission. The petition for a writ of certiorari seeks review of these rulings.

ARGUMENT

1. It is now a well settled principle of statutory construction, contrary to the position of petitioners, that an evidentiary trial-type hearing is not an essential prerequisite where the statute requires, as under Section 201(a) of the Communications Act of 1934, as amended,[15] only an "opportunity for hearing". Since the *Second Chenery* case,[16] it has been a matter of agency discretion whether policy shall be enunciated by ad hoc decisions in adjudicatory cases upon an evidentiary record, or by general inquiry and rule making proceedings. Circuit Judge Henry J. Friendly in 1970 recognized that the "trend of judicial decision has been to extend the agencies' power to handle their problems by rule making."[17] More recently, Circuit Judge J. Skelley Wright has observed that administrative law has entered "an age of rulemaking", and that especially in rapidly expanding realms such as economic regulation, "the policy disputes are too sharp, the technological considerations too complex, the interests affected too numerous, and the missions too urgent for

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[14] Id., 46 F.C.C.2d at 430-435 (Pet.App. 32b-40b).

[15] 47 U.S.C. § 201(a).

[16] *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).

[17] *Long Island Railroad Co.* v. *United States*, 318 F.Supp. 490, 496 (D.C.N.Y. 1970).

agencies to rely on the ponderous workings of adjudication." [18]

This Court held in 1972 in *Allegheny-Ludlum* [19] that the adjudicatory provisions of the Administrative Procedure Act [20] need be applied only where the agency statute, in addition to providing for a hearing, prescribes explicitly that it be "on the record", or words of similar import. The issue now sought to be raised by petitioners was definitively settled in the *Florida East Coast* case,[21] where this Court held that the term "hearing" may be satisfied by adherence to the rule making requirements of Section 4 of the Administrative Procedure Act,[22] and does not by its own force require the Commission to hear oral testimony, to permit cross-examination, or (as it did in the proceeding below) to hear oral argument.

Thus, for the reasons stated in its opinion, the Court below correctly held that the statutory provision of an "opportunity for hearing" does not per se require an evidentiary hearing; that an evidentiary hearing was not required in the circumstances of this individual case before the Commission; and, as the Commission also held within its expertise, that the factual issues alleged by petitioners did not require an evidentiary hearing.[23]

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[18] Wright, "The Courts and the Rulemaking Process: The Limits of Judicial Review," 59 Cornell Law Rev. 375, 376 (1974).

[19] *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972).

[20] 5 U.S.C. § 554.

[21] *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224, 240 (1973).

[22] 5 U.S.C. § 553.

[23] Note 4 *supra*, 503 F.2d at 1264-1268 (Pet.App. 28a-36a).

In a related case upholding the Commission's policy in favor of the entry of new carriers in the specialized communications field, the Ninth Circuit has also recently held that rule making proceedings rather than adjudicative hearings on individual applications were appropriate to resolve the issues.[24]

2. There is no conflict or division among the Courts of Appeals on the issue when an evidentiary hearing is required, as the Third Circuit's decision itself makes clear in declining to follow a line of cases where evidentiary hearings were found necessary.[25] These very cases, inter alia, are cited by the Third Circuit for the rule that "it is well settled that there is no need for an evidentiary hearing when [it is found, as here] there is no material factual dispute involved."[26]

3. There is no dispute among the Circuits with the *principle* of the *Second Morgan* case[27] that an administrative hearing must include a reasonable opportunity to know the claims of the opposing party and what the Government proposes. The only question here is its *application* to the circumstances of this case. Whatever uncertainty may be alleged to have existed previously (and both the Commission and the Court below ruled that the full scope of interconnection was fairly

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[24] *Washington Utilities & Transportation Commission* v. *FCC*, note 3 *supra*.

[25] Citing *Appalachian Power Co.* v. *Environmental Protection Agency*, 477 F.2d 495, 501 (4th Cir. 1973); *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission*, 420 F.2d 577, 585-586 n. 22, 589 n. 36 (D.C.Cir. 1969); *Citizens for Allegan County* v. *FPC*, 414 F.2d 1125, 1128-1129 (D.C. Cir. 1969).

[26] Note 4 *supra*, 503 F.2d at 1267 fn. 25 (Pet.App. 34a fn. 25).

[27] *Morgan* v. *United States*, 304 U.S. 1, 18-19 (1938).

encompassed in the Commission's prior orders), certainly the issue was crystallized in the notice of inquiry in the proceeding here under review, ordering the parties to address themselves to the questions whether, inter alia, the Commission had theretofore ordered the telephone companies to provide interconnection or whether such interconnection is otherwise required; if so, the scope of the order or rule, with particular reference to FX and CCSA interconnection; and, if not, whether such interconnection should be ordered.[28]

4. The contracts with Western Union which petitioners seek to abrogate by tariff will remain in effect only until September 28, 1978, because of a notice of termination, and it appears undisputed that they will not be renewed at that time. The issue sought to be raised by petitioners is thus of very limited precedential value. Contrary to the position of petitioners, the Court below has ruled that cases claimed by petitioners to be in conflict are distinguishable, and that the issue properly raised only required a determination of which precedent was the appropriate model to resolve the controversy between petitioners and Western Union.[29]

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[28] Note 5 *supra*, 24 F.C.C.2d at 251-252.

[29] Note 4 *supra*, 503 F.2d at 1274-1276 (Pet.App. 48a-51a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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